Nos. 1025-1026

In the Supreme Court of the United States

OCTOBER TERM, 1941

No. 1025

NATIONAL BROADCASTING COMPANY, INC., WOODMEN OF THE WORLD LIFE INSURANCE SOCIETY AND STROMBERG-CARLSON TELEPHONE MANUFACTURING COMPANY, APPELLANTS

v.

THE UNITED STATES OF AMERICA, FEDERAL COMMUNICATIONS COMMISSION, AND MUTUAL BROADCASTING SYSTEM, INC., APPELLEES

No. 1026

COLUMBIA BROADCASTING SYSTEM, INC., APPELLANT

v.

THE UNITED STATES OF AMERICA, FEDERAL COMMUNICATIONS COMMISSION, AND MUTUAL BROADCASTING SYSTEM, INC., APPELLEES

ON APPEAL FROM THE DISTRICT COURT OF THE UNITED STATES FOR THE SOUTHERN DISTRICT OF NEW YORK

BRIEF FOR THE UNITED STATES AND THE FEDERAL COMMUNICATIONS COMMISSION

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OPINION BELOW

The opinion of the district court (Learned Hand, Cir. J., and Goddard, D. J.), and the dissenting

opinion (Bright, D. J.), appear in the National Broadcasting case (NBC) record (No. 1025) at pp. 432–445, and in the Columbia Broadcasting case (CBS) record (No. 1026) at pp. 456–470.[1]

JURISDICTION

The decision of the court below, dismissing the complaints, was entered on February 21, 1942. Petitions for appeal were filed on February 28, 1942, and were allowed on March 2, 1942 (NBC R. 451–453; CBS R. 471, 483). On March 16, 1942, this court noted probable jurisdiction. The jurisdiction of this court on appeal rests on the Act of October 22, 1913, 38 Stat. 219, 220, 28 U. S. C. §§ 47–47a, as extended by the Communications Act of 1934, 48 Stat. 1064, 47 U. S. C. § 402 (a).

QUESTION PRESENTED

Whether certain regulations announced by the Federal Communications Commission setting forth policies to be applied by the Commission in licensing radio stations engaged in chain broadcasting, are at this time subject to judicial review in an equity proceeding.

STATUTES INVOLVED

The pertinent provisions of the Communications Act of 1934, 47 U. S. C., §§ 151 et seq., and of the

[1] Since the court below disposed of the two cases in a single opinion and since the same issues are involved, this brief will cover both cases.

Urgent Deficiencies Act, 28 U. S. C. §§ 43–48, are set forth in the Appendix, *infra*, pp. 59–64.

STATEMENT

These suits were brought on October 30, 1941[2] in a statutory three-judge district court to enjoin the enforcement of certain regulations, relating to radio broadcast stations engaged in chain broadcasting, which were adopted by the Federal Communications Commission on May 2, 1941, and amended October 11, 1941. There are eight such regulations, designated by the Commission as Regulations 3.101 to 3.108, inclusive. (See Appendix, pp. 64–69, *infra*.)

Chain broadcasting is the principal means by which programs of interest are made available to all or a large part of the national radio audience.[3] It is defined in the Communications Act as the "simultaneous broadcasting of an identical program by two or more connected stations"[4] and is accomplished by sending the program by telephone

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[2] The CBS complaint was amended on January 12, 1942 (CBS R. 46–48).

[3] Depending upon their power, which ranges from 100 to 50,000 watts, individual radio stations render satisfactory technical service within a radius from the transmitter which varies from only a few miles to 100 or 150 miles. At night, the more powerful stations also render a less satisfactory "secondary service" within a radius of hundreds of miles from the transmitter.

[4] Section 3 (p) of the Communications Act of 1934, 48 Stat. 1066, 47 U.S.C. § 153 (p).

wire from its point of origin to each of the outlet stations of the chain or network for broadcasting over their transmitters. These outlet stations are in some instances owned and operated by the network organizations themselves, but more commonly they are independently owned and are associated with the network by means of an "affiliation contract."

At the time they brought these suits the appellants, National Broadcasting Company, Inc. (herein called NBC or National), and Columbia Broadcasting System, Inc., (herein called CBS or Columbia) operated three of the four nation-wide "chains" or "networks."[5] Appellants, Woodmen of the World Life Insurance Society and Stromberg-Carlson Telephone Manufacturing Company are the licensees respectively of Stations WOW at Omaha, Nebraska, and WHAM, at Rochester, New York, which are affiliated with NBC and thereby are engaged in chain broadcasting.

The United States and the Federal Communications Commission were joined as defendants in the suit brought by NBC. The CBS suit was brought against the United States alone, but the Federal

[5] NBC then operated two networks known as the "Red" and the "Blue," but during the course of this proceeding the court was advised that it had disposed of the Blue network. (NBC R. 434.) NBC has transferred the Blue network to a new corporation—Blue Network, Inc.—which, like NBC is a wholly owned subsidiary of the Radio Corporation of America (NBC Br. 5).

Communications Commission intervened as a defendant. Mutual Broadcasting System, Inc., which operates the fourth national network, intervened in both cases as a defendant.

The proceedings before the Commission.—The regulations sought to be attacked were adopted by the Commission as the result of an investigation instituted on March 18, 1938, "to determine what special regulations applicable to radio stations engaged in chain or other broadcasting are required in the public interest, convenience, or necessity." (NBC R. 37–38; CBS R. 57–58.) On April 6, 1938, a committee of three Commissioners was appointed to hold hearings and to make a report with recommendations to the Commission. The committee held hearings between November 14, 1938 and May 19, 1939. The networks and other interested persons participated actively in the hearings and expressed their views at length. The testimony and exhibits fill 27 large volumes.* On June 12, 1940, the committee issued its report. (NBC R. 37–38; CBS R. 57–58.)

Thereafter, briefs were filed on behalf of the national networks and other interested parties, and oral arguments were presented before the full Com-

* The record before the Commission was filed with the court below in support of the Government's motions to dismiss the complaint or in the alternative for summary judgment, and also in opposition to appellants' motions for preliminary injunction. (NBC R. 262, 380; CBS R. 346, 453.)

mission. On May 2, 1941, the Commission issued its Report, together with an order adopting the eight regulations here attacked.[1] The effective date of the regulations was deferred for 90 days with respect to existing contracts and licenses of network-operated stations (NBC R. 128; CBS R. 148).

The effective date of the regulations with respect to existing contracts and network station licenses was successively postponed by the Commission on June 13, July 22, and August 28, 1941.[2] On August 14, 1941, Mutual petitioned the Commission to amend two of the regulations, 3.103 and 3.104. Briefs were filed by the national networks and one regional network, and oral argument was had before the Commission September 12, 1941. Thereafter, on October 11, 1941, the Commission issued a Supplemental Report on

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[1] The Commission's Report was attached to NBC's complaint as Exhibit D (NBC R. 29–200) and to the CBS amended complaint as Exhibit B (CBS R. 49–220). Two of the seven Commissioners filed additional views, which are included in the Report, dissenting from the action taken by the Commission.

[2] On June 13, 1941, the Commission postponed the effective date of Regulation 3.107 for 90 days from May 2, 1941. On July 22, 1941, the effective date of all the rules with respect to existing contracts and network station licenses was deferred until September 16, 1941, and on August 28, 1941, said effective date was postponed pending action on a petition filed by Mutual for amendments to two of the regulations (NBC R. 201–205; CBS R. 20–22).

Chain Broadcasting,[9] together with amendments to three of the regulations (3.102, 3.103, and 3.104). The Commission simultaneously postponed the effective date of the regulations with respect to existing contracts and licenses of network-operated stations until November 15, 1941, and suspended the effective date of Regulation 3.107 indefinitely, with the provision that any subsequent order of the Commission placing Regulation 3.107 in effect should provide for not less than six months' notice.

On October 31, 1941, the Commission adopted a Minute (see appendix, pp. 69–70) with reference to the procedure which it proposed to follow in applying the policies announced in the chain broadcasting regulations. The Minute sets forth that if any licensee wishes to contest the validity of the regulations or the reasonableness of their application to the particular licensee, the license will be designated for hearing. It further sets forth that such licensee will be granted a temporary extension of its license so that it may remain on the air pending the proceeding before the Commission and pending appeal to the courts from a decision in any such proceeding; and, further, that in the event that the validity of the

[9] The Supplemental Report is attached to the NBC complaint as Exhibit E (NBC R. 201–217) and to the CBS complaint as Exhibit C (CBS R. 20–36). Two of the six Commissioners (there being at that time one vacancy on the Commission) dissented from the Supplemental Report in an opinion included therein.

regulations as applied to the licensee should be upheld, the Commission would nevertheless grant a regular license to the licensee if he thereupon conformed to the decision in the litigation. (NBC R. 440–441; CBS R. 465–466.)

Factual Background.—The chain broadcasting regulations here attacked are applicable to radio broadcasting stations operated in the "standard broadcast band." This band—550 to 1600 kilocycles[10]—is a small portion of the entire radio spectrum, the balance of which is allocated for other radio uses.[11]

Within the standard band there are approximately 106 "channels" available for broadcasting stations.[12] These 106 channels are occupied by

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[10] Federal Communications Commission, Rules and Regulations, Part 2, Appendix B, Frequency Allocations. A copy of the Commission's Rules and Regulations has been filed with the Clerk.

[11] The various uses in the remainder of the spectrum include other forms of broadcasting and radio communication, such as television and frequency modulation, amateur, police, marine, aeronautical, and military radio, and many other services. Federal Communications Commission, Rules and Regulations, Part 4, Rules Governing Broadcast Services Other Than Standard Broadcast; Part 5, Rules and Regulations Governing Experimental Radio Services; Part 6, Rules Governing Fixed Public Radio Services; Part 7, Rules Governing Coastal and Marine Relay Services; Part 8, Rules Governing Ship Service; Part 9, Rules and Regulations Governing Aviation Services; Part 10, Rules Governing Emergency Radio Services; and Part 12, Rules Governing Amateur Radio: Stations and Operators.

[12] In order that there be opportunity for effective selection by listeners among radio stations, the Commission's rules

some 900 licensed broadcast stations. The number of stations which can be placed on a single channel without causing wasteful interference is determined by the power and location of the stations, and the design of their transmitting antennas.

In order that the limited spectrum available for standard broadcasting be utilized most efficiently and in the best interests of the listening public, the various channels are not all put to the same kind of use. Soon after the passage of the Radio Act of 1927, 44 Stat. 1162, the Federal Radio Commission (the predecessor of the Federal Communications Commission in the radio field) developed a plan of allocation of stations among the various channels. The allocation plan in its present form is embodied in regulations promulgated by the Federal Communications Commission.[11] These allocation regulations are declarations of policy which guide the Commission in exercising its licensing functions. Thus, for example, on six channels the Commission licenses only "local" stations operating with power of 100 or 250 watts; many such stations can be assigned to a single channel, as each station renders service only a few miles from the transmitter. About 40 channels are assigned for

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(*infra*, note 13) require a separation of 10 kilocycles between each channel.

[11] Federal Communications Commission, Rules and Regulations, Allocations of Facilities, Sections 3.21–3.34, and Standards of Good Engineering Practice Concerning Standard Broadcast Stations, Section 1.

the medium-sized "regional" stations, which utilize from 500 watts to 5 kilowatts of power, and about 45 channels for the powerful "clear channel" stations, which may use from 10 to 50 kilowatts.[14]

The limited portion of the radio spectrum available for broadcasting restricts not only the total number of broadcast stations, but, if fair distribution is to be made, the number which can be established in particular communities. New York City, Chicago, and Los Angeles have a dozen or more stations each, and most of the other very large cities have from 5 to 8 stations. Some 35 cities have 4 or more full-time[15] stations, and some 60 have 3 or more (NBC R. 87, 104; CBS R. 107, 124).

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[14] Depending on power, location, and antenna design, from one to four clear channel stations can usually be placed on a single channel. These large stations are very important in furnishing service to the rural areas. Both day and night, they furnish a reliable and consistent "primary" service which may extend as far as 150 miles from the transmitter. At night, such stations also furnish a "secondary" or "skywave" service, which results from the reflection of radio waves from the so-called Kennelly-Heaviside layer, many miles above the surface of the earth. This "secondary" service extends for hundreds of miles from the transmitter, and is the only radio service which large areas of the country receive, but it is weaker, and more fluctuating and uncertain, than "primary" radio service, and in general is usable only between sunset and sunrise. See Section 3.11, Federal Communications Commission, Rules and Regulations, and Standards of Good Engineering Practice Concerning Standard Broadcast Stations, Section 1.

[15] Some stations are authorized to operate only in the daytime or only during certain specified hours.

All these stations, depending on their power and the nature of the surrounding territory, serve a variety of functions and purposes. The programs which they provide may be local, regional, or national in character. Except for a few non-commercial stations, however, all of them are supported by selling time for the use of their broadcasting facilities for advertising purposes, and these revenue-producing programs are called "commercial" or "sponsored" programs, as distinguished from "sustaining" programs, which are provided by the station itself without commercial sponsorship (NBC R. 41, 75–76; CBS R. 61, 95–96).

Because no single station or small group of stations is able to provide truly national coverage, and because many programs of national interest cannot be produced by single stations with limited resources and perhaps remote from talent centers and the scene of national events, the need for chain broadcasting became manifest soon after broadcasting first began.[16] The oldest existing national broadcasting organization—the National Broadcasting Company—was formed in 1926, and the Columbia Broadcasting System dates from January, 1927. The newest national network, Mutual, was founded in September 1934. (NBC R. 44, 57, 62; CBS R. 64, 77, 82).

Networks as such are not licensed or subject to regulation under the Communications Act.

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[16] Broadcasting began in 1920, and the first network broadcast occurred in January 1923 (NBC R. 41; CBS R. 61).

Their business consists basically of entering into contracts with national advertisers, usually through advertising agencies, making arrangements for the distribution of commercial programs, sponsored by these advertisers, over leased wire lines for broadcasting by the stations comprising the network, and producing or arranging for the production of sustaining programs (which are not commercially sponsored). NBC and CBS each are licensed to operate several important high-powered stations located in the principal radio markets,[11] but for the most part the networks obtain broadcasting outlets for their programs by contracts with independently owned stations. These independently owned stations which carry network programs are generally referred to as "affiliates," and the contract as an "affiliation contract."

NBC and CBS furnish both commercial and sustaining programs to their affiliates. Sustaining programs may be accepted or rejected at will by the affiliates, and are made available to them at no separate charge. NBC and CBS have basically similar arrangements for compensation to their affiliates for network commercial programs.

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[11] CBS is the licensee of 8 stations; at the time this litigation was instituted NBC was the licensee of 10 stations, but at the present time 6 of these stations are still licensed to NBC, 3 have been transferred to the new "Blue" network, and one has been transferred to other interests (NBC R. 51–52; CBS R. 79).

Stated in simplified terms, their affiliation contracts establish a rate for each station which is charged to the advertiser for the use of that station's time;[18] a portion of the receipts from the advertiser is turned over to the station, and a portion retained by the network. Accounting between the network and the station is on a 28-day basis. The station usually receives no compensation for carrying a fixed minimum amount of commercial programs during that period, but if commercials over and above the minimum are furnished, the station receives a portion of the rate, which increases as more commercials are taken. The time of the station which is furnished free to the network for commercial programs, and the portion of the station rate retained by the network for the other hours, cover the network's sustaining program costs, wire line and other expenses, and profits.[19]

Because of the limited area covered by any single station, it is important that a network have an outlet in each radio advertising market which it purports to cover.[20] This necessity, as is described

[18] For the most part, these rates range from $120 to $1,200 per evening hour, depending upon the power and location of the station (NBC R. 77, 78; CBS R. 97, 98).

[19] NBC R. 76-79; CBS R. 96-99.

[20] Because the electrical "noise level" is much higher in cities than in rural areas, a stronger signal is necessary to provide service in cities than in the country. See Sections 1, and 4, Standards of Good Engineering Practice Concerning Standard Broadcast Stations. This technical factor accentuates the need of a network to have an outlet situated in or near each large city which it purports to cover.

immediately hereafter, was found by the Commission to raise acute problems in those cities having four or less stations.

The Chain Broadcasting Regulations.—The legality and wisdom of the regulations attacked in these suits are not in issue in these appeals, but the reasons which led to their adoption are closely related to the manner in which they are to be applied by the Commission, and are therefore relevant to the jurisdictional question here presented. The purposes which underlie the regulations are set forth in the Commission's Report and Supplemental Report, attached to the complaint in both suits.

The principal function of the Commission in the broadcasting field is to act upon applications for and by broadcast stations. The statutory standard for the exercise of this function is "public interest, convenience, or necessity," which is given significance "by its context, by the nature of radio transmission and reception, by the scope, character and quality of services," and by the general objectives of the statute.[21] The Commission is also given specific authority by Section 303 (i) of the Communications Act to adopt "special regulations applicable to radio stations engaged in chain broadcasting." The impact of these provisions upon existing network practices was the principal sub-

[21] *Federal Radio Comm'n* v. *Nelson Bros. Co.*, 289 U. S. 266, 285.

ject of the Commission's investigation and reports, and whether the statutory standard comprehends the regulations which resulted from the investigation is the principal question sought to be tested by these suits.

The Report and Supplemental Report show that the Commission, in applying the public interest standard to existing network practices, followed certain basic lines of thought: that the individual station licensee is responsible under the law for the operation of his station in the public interest and that this responsibility may not be divested or transferred to anyone else;[22] that the widest and most effective use of radio should be promoted;[23] that competition in the broadcast field should be preserved;[24] and that such a degree of concentration of control of broadcasting as would tend to restrict the channels of communication and expression or the sources of programs should be prevented.[25] In applying these principles, the Commission acted in the belief that broadcast stations should be reasonably available for programs of local and regional, as well as national interest,[26] that communities should, as far as practicable, have available service from more than one or all national

[22] NBC R. 88, 97, 101, 102, 117; CBS R. 108, 117, 121, 122, 137.

[23] NBC R. 93, 98, 116–117; CBS R. 113, 118, 136–137.

[24] NBC R. 82–86, 88, 97, 103, 108, 111, 118–119; CBS R. 102–106, 108, 117, 123, 128, 131, 138–139.

[25] NBC R. 92, 108–109; CBS R. 112, 128–129.

[26] NBC R. 101; CBS R. 121.

networks,[27] and that methods of nation-wide broadcasting other than by means of networks (such as by transcriptions), should not be unreasonably restricted.[28]

From these points of departure, the Commission declared in Regulation 3.101 a policy against clauses embodied in Columbia's affiliation contracts (but not in National's [29]) which prevent the affiliate from carrying the programs of competing networks. The Commission found that, in cities where there are fewer than four stations, such clauses operate to exclude the programs of one or more of the existing national networks, and that in cities with only four stations a new network would be excluded. The Commission further found that such clauses restrict the station's freedom to select among available network programs, and tend to deprive the listening public in each community of the fullest enjoyment of its radio facilities (NBC R. 87–93; CBS R. 107–113).

Correlatively, the Commission declared in Regulation 3.102 a policy against clauses embodied in Columbia's affiliation contracts (but not in National's [30]) which prohibit the network from furnishing programs to any other station in the service area of the affiliate. So far as these clauses prevent

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[27] NBC R. 88; CBS R. 108.

[28] NBC R. 100; CBS R. 120.

[29] This is shown by National's complaint. NBC R. 12, 18–25.

[30] See footnote 29, *supra*.

duplication of programs in the same area, the Commission found them unobjectionable. But the Commission found that these clauses had the further effect that, even where the affiliate rejects the program offered by the network, other stations in the community are prevented from utilizing the program. The Commission found that these clauses, insofar as they prevent communities from receiving network programs which a community station is ready and willing to carry, are not in the public interest (NBC R. 93–95; CBS R. 113–115).

Both National's and Columbia's affiliation contracts contain a provision which gives the network an option, exercisable on 28 days' notice, on the time of the station for network commercial programs. The Columbia option time clause covers all the clock hours in the broadcast day;[31] the National clauses, in general, cover 8½ specified hours each day.[32] The Commission found that the result

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[31] The one limitation upon the power of Columbia to call upon its affiliates to broadcast network commercial programs is that an outlet is not obligated to broadcast more than 50 converted hours (approximately 79 clock hours) during any week. Since the above limitation is on an over-all basis, no specified clock hours are excluded from the option (CBS R. 93).

[32] The NBC options, in general, cover the hours from 10 a. m. to 12 noon, 3 p. m. to 6 p. m., 7 p. m. to 7:30 p. m., and 8 p. m. to 11 p. m. The Sunday optioned hours are somewhat different. In the case of NBC affiliates west of Denver, the NBC option covers the entire broadcast day (NBC R. 73).

of these clauses is that no NBC or CBS affiliate can give a competing network or a non-network customer a firm commitment for the use of the affiliate's time (within the hours covered by the option) for more than 28 days in advance. Consequently, the Commission concluded that these option time provisions have approximately the same effect with respect to network programs as do the exclusive affiliation clauses, since the option clauses make it impossible for the affiliate to accept any programs from a competing network (within the hours covered by the option) except subject to removal or cancelation should the option be exercised. The Commission also found that option time provisions have further restrictive effects which the exclusive affiliation clauses do not have, inasmuch as the option time provisions can be utilized not only to remove or cancel the programs of another network, but also to remove *any* program, including local and national non-network programs (NBC R. 98–101; CBS R. 118–121).

For these reasons, the Commission declared, in Regulation 3.104 as amended, a policy intended to limit the scope and effect of option time clauses. The policy requires the reservation of a specified amount of time which cannot be optioned to networks at all and during which non-network programs can accordingly be scheduled on a firm basis; it requires that the option be exercised only on 56- rather than 28-days' notice; and it further provides

that the option can be utilized only as against non-network programs, and cannot be used to remove or cancel the programs of another network.[33]

Regulation 3.106 deals, not with affiliation contracts, but with the direct operation of broadcast stations by network organizations. Both NBC and CBS are now licensed to operate several important and powerful stations located in principal radio markets. The Commission found that, in communities where the available radio facilities are few in number or of markedly unequal coverage, network operation of stations, like exclusive affiliation clauses, might shut out other networks from the community.[34] Accordingly, the Commission in this rule declared a policy against the licensing of stations to network organizations "in any locality where the existing standard broadcast stations are so few or of such unequal desirability (in terms of coverage, power, frequency, or other related matters) that competition would be substantially restrained by such licensing."

The foregoing discussion is intended to be illustrative of the purpose underlying the regulations, rather than a complete statement of their scope and

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[33] It should be noted that the policy declared in Regulation 3.104 does not restrict the outright purchase of station time by a network for a program or series of programs (NBC R. 207; CBS R. 26).

[34] NBC R. 102–105; CBS R. 122–125.

effect.[35] The Commission concluded that the regulations would foster and strengthen network broadcasting and benefit the listening public, and that they would preserve without loss the contributions of network broadcasting without interfering unduly with the operations of the network organizations (NBC R. 124, 212; CBS R. 31, 144).

The proceedings in the court below.—The complaint of NBC, Woodmen, and Stromberg (No. 1025) requests the court to enjoin the enforcement of all eight of the Commission's chain broadcasting regulations. The CBS complaint seeks an injunction against Regulations 3.101–3.106 only. Both

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[35] The remaining regulations, and other phases of the regulations which have been dealt with, are of less importance or are not as seriously contested.

Regulation 3.103 declares a policy against affiliation contracts of more than two years' duration.

Regulation 3.105 declares a policy regarding the basis upon which affiliates may reject programs offered them by networks.

Regulation 3.106, in addition to the feature described above, declares a policy against licensing more than one station to a network organization in any community. In view of the statement made concerning this phase of Regulation 3.106 in the Commission's Minute of October 31, 1941 (Appendix, pp. 69–70, *infra*), it is of little immediate importance.

Regulation 3.107 declares a policy against the affiliation of broadcast stations with a network organization operating more than one network. The effective date of this regulation was indefinitely suspended by the Commission's Supplemental Report of October 11, 1941.

Regulation 3.108 deals with a clause formerly, but not presently, embodied in National's affiliation contracts.

complaints allege in substance that the Federal Communications Commission has no power under the statute to issue the regulations in question, and that they are arbitrary, unreasonable, unconstitutional, and without basis in the evidence (NBC R. 14–16; CBS R. 11–12, 48).

On November 8, 1941, the Government filed motions to dismiss the complaint or, in the alternative, for summary judgment. In substance these motions allege that the complaints should be dismissed because the court is without jurisdiction of the subject matter of the actions, because the complaints fail to state a claim upon which relief can be granted, and because there is no genuine issue of fact and the defendants are entitled to judgment as a matter of law (NBC R. 375–376; CBS R. 449).

Upon the filing of these motions a stipulation was entered into for the suspension of the regulations pending a hearing on all the motions and a determination by the court of appellants' motions for a preliminary injunction (NBC R. 430; CBS R. 454–455).

The case was heard by a three-judge court convened pursuant to the provisions of the Urgent Deficiencies Act, and on February 21, 1942, the Court, with one judge dissenting, granted the Government's motions to dismiss the complaints for lack of jurisdiction over the subject matter of the actions.[36]

[36] Since these cases are before this Court on the basis of plaintiffs' complaints and defendants' motion to dismiss,

On February 27, 1942, appellants filed with the court below motions for [illegible] pending determination of their appeals. The court below, on March 2, 1942, entered an order restraining the enforcement of the chain broadcasting regulations until May 1, 1942, or the argument of the appeals in this Court, whichever is earlier (NBC R. 451; CBS R. 482).

SUMMARY OF ARGUMENT

The chain broadcasting regulations provide that "no license shall be granted" to broadcasting stations having network contracts which contain certain provisions. The regulations themselves, however, neither grant nor deny broadcasting licenses. The procedure governing the issuance of licenses is prescribed in Sections 308 and 309 of the Communications Act. Under these provisions the Commission can *grant* a license without a hearing but cannot *deny* one without a hearing. Under the Commission's rules and regulations interested persons are permitted to intervene in these hearings.

The Commission has particularized the procedure with respect to hearings involving questions under the chain broadcasting regulations by its

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plaintiffs' affidavits in support of their motions for an interlocutory injunction are not pertinent. The cases cited by Columbia (Br. 13–14) are not to the contrary. They establish, rather, the proposition that where a motion to dismiss or for summary judgment is based on facts not presented or adequately disclosed by the pleading to which it is filed, such facts may be presented by affidavits in support of the motion.

Minute of October 31, 1941. That Minute provides that any licensee may contest the validity of the chain broadcasting regulations or the reasonableness of their application to him without fear of loss of license. In the event a license is denied, the applicant and any other person whose interests are adversely affected may have judicial relief as a matter of right under Section 402 (b) of the Communications Act.

Thus, the chain broadcasting regulations simply announce the policies which the Commission intends to follow in exercising its licensing functions. Since the regulations are not final and the administrative process has not been completed, the regulations are not reviewable at this time. Resort to the courts to review administrative action of this type "is either premature or wholly beyond their province". *Rochester Tel. Corp.* v. *United States*, 307 U. S. 125, 130; *United States* v. *Los Angeles R. R. Co.*, 273 U. S. 299; *Myers* v. *Bethlehem Corp.*, 303 U. S. 41.

Review of the regulations under Section 402 (b) of the Act is particularly appropriate for administrative action of the type involved here. The Commission did not undertake to frame regulations carrying penal consequences and which would have required immediate revision of affiliation contracts under the threat of criminal penalties. Instead, it framed regulations which would serve as a guide to applicants and other in-

terested parties, stating the policies which it proposed to implement and develop in the course of its licensing functions. While there is a strong likelihood that these regulations will be followed in proceedings on individual applications, the Commission's Report, Supplemental Report, and Minute clearly indicate that the further administrative proceedings are substantial and not a mere formality. Since the rules can be applied only on a case-to-case basis, it is not only appropriate but highly desirable that court review be on the same basis.

ARGUMENT

THESE SUITS ARE PREMATURE BECAUSE THE REGULATIONS HAVE NO IMMEDIATE LEGAL EFFECT BUT ARE MERE DECLARATIONS OF POLICY TO BE APPLIED IN FUTURE ADMINISTRATIVE PROCEEDINGS

1. *The manner in which the regulations are to be given effect.*—As the statement of facts discloses (pp. 16–20, *supra*) the regulations provide that "no license shall be granted" to broadcasting stations having network contracts which contain certain provisions. The regulations themselves, however, neither grant nor deny broadcasting licenses.

The procedure governing the issuance of licenses is prescribed in Sections 308 and 309 of the Communications Act. Section 308 (a) provides:

> The Commission may grant licenses, renewal of licenses and modification of license, only upon written application therefor received by it * * *

Section 309 (a) provides:

> If upon examination of any application for a station license or for the renewal or modification of a station license the Commission shall determine that public interest, convenience, or necessity would be served by the granting thereof, it shall authorize the issuance, renewal, or modification thereof in accordance with said finding. In the event the Commission upon examination of any such application does not reach such decision with respect thereto, it shall notify the applicant thereof, shall fix and give notice of a time and place for hearing thereon, and shall afford such applicant an opportunity to be heard under such rules and regulations as it may prescribe.

Thus, while the Commission is empowered by the Act to *grant* a license without a hearing, it cannot *deny* an application without hearing. At such hearing any interested person may intervene by complying with the Commission's intervention rule.[37]

The Commission has particularized the procedure with respect to hearings involving questions under the chain broadcasting regulations by its

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[37] Regulation 1.102, provides: "Petitions for intervention must set forth the grounds of the proposed intervention, the position and interest of the petitioner in the proceeding, the facts on which the petitioner bases his claim that his intervention will be in the public interest, and must be subscribed or verified in accordance with section 1.122."

Minute of October 31, 1941. That minute (quoted in full in Appendix, pp. 69–70) provides in part:

> If a station wishes to contest the validity of the Chain Broadcasting Regulations adopted in Docket No. 5060, or the reasonableness of their application to the particular station, its license will be set for hearing. In order to insure that the station may remain on the air and be in no way injured by any such Commission proceeding and appeal to court from a decision in such proceeding, the Commission will grant such licensee a temporary extension of its license, with renewals from time to time until there has been a final determination of the issues raised at such hearing. In the event of such litigation, and if the validity of the application of the Chain Broadcasting Regulations to such licensee is sustained by the courts, the Commission will nevertheless grant a regular license to the licensee, otherwise entitled thereto, who has unsuccessfully litigated that issue, if the licensee thereupon conforms to the decision."

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[11] This minute confirms assurances given by Chairman Fly in his testimony before the Senate Committee on Interstate Commerce several months prior to the institution of these suits. Hearings on S. Res. 113, 77th Cong., 1st sess., pp. 59, 71.

There is no merit to the suggestion in the dissenting opinion (NBC R. 444; CBS R. 469) that the Minute cannot be considered because it was not entered until after these suits were filed. The Minute constitutes a statement by the Commission of the procedure it will follow in applying the Chain Broadcasting Regulations. The fact that it was issued after

Under Section 402 of the Communications Act, judicial review of Commission action, depending upon its type, may be had in the Court of Appeals for the District of Columbia or in a statutory three-judge court. If the action involved is the grant or denial of an application for a construction permit, radio station license, or renewal or modification of a radio station license, the method of review is by appeal to the Court of Appeals under Section 402 (b) (1) and (2). Such an appeal may be taken either by the applicant or by any other person aggrieved or whose interests are adversely affected by the Commission's action. Any other type of Commission action which is susceptible of judicial review, with one minor exception,[11] is by Section 402 (a) made reviewable in a statutory three-judge district court.

In the light of the foregoing, the procedural significance of the chain broadcasting regulations is simply that any licensee who has an affiliation contract which does not conform to the policy announced in the regulations will have his next renewal application designated for hearing. All interested persons will have an opportunity to in-

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rather than before the institution of the instant suits does not detract from its relevancy and makes it no less binding on the Commission." *American T. & T. Co.* v. *United States*, 299 U. S. 232, 240–241; *United States* v. *Illinois Central R. Co.*, 291 U. S. 457, 461–462.

[11] The minor exception is that radio operators whose licenses have been suspended by the Commission are to seek review in the Court of Appeals for the District of Columbia.

tervene in the hearing under Regulation 1.102, *supra*, p. 25, n. 37. If at the hearing, the applicant or the interveners satisfy the Commission that the applicant's license should be renewed despite the inclusion in his affiliation contract of clauses which do not conform to the regulations, the Commission will modify or waive the regulations and grant the renewal.[40] If, because of the terms of the affiliation contract, the applicant or interveners fail to satisfy the Commission that the grant of a renewal would be in the public interest the application will be denied. In the latter event, the applicant and any other person whose interests are adversely affected may have judicial review as a matter of right under Section 402 (b).

Thus, as the Commission pointed out in its Report on Chain Broadcasting, the regulations simply

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[40] CBS seems to assume that the applicant is limited to contesting "validity" of the regulations in the hearing upon his application (CBS Br. p. 20). However, the Minute expressly states that the reasonableness of applying the regulations in a particular case is also at issue in the hearings. *Supra*, p. 26. The concluding paragraph of the Commission's supplemental report states (NBC R. 212; CBS R. 31–32):

"The Commission stands ready at all times to amend and modify its regulations upon the petition of any network, national or regional, or any station or group of stations if it can be shown that those regulations prevent profitable network operations, or unduly disturb any aspect of broadcasting, or that because of special or changed circumstances the chain broadcasting regulations should not be applicable to any particular situation."

announce the policies which it intends to follow in exercising its licensing functions (NBC R. 121; CBS R. 141):

> Announcements of policy may take the form of regulations or of general public statements. In either case, the applicant's right to a hearing on the question whether he does in fact propose to operate in the public interest is fully preserved. The regulations we are adopting are nothing more than the expression of the general policy we will follow in exercising our licensing power. The formulation of a regulation in general terms is an important aid to consistency and predictability and does not prejudice any rights of the applicant. Good administrative practice would seem to demand that such a statement of policy or rules and regulations be promulgated wherever sufficient information is available upon which they may be based.[41]

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[41] See *Final Report of the Attorney General's Committee on Administrative Procedure in Government Agencies*, S. Doc. 8, 77th Cong., 1st sess. pp. 26–27.

The Commission employs other methods to announce the policies it will follow in its licensing activities. In addition to regulations, the Commission announces policy in press releases and written opinions. For example, the Commission's policy with respect to licensing new standard broadcasting stations during the present war emergency was made public in a memorandum opinion dated February 23, 1942. 7 Fed. Reg. 1702 (1942). This opinion stated that because of a shortage of the critical material required for the construction of radio stations the Commission would not issue any

2. *Since the regulations are not final and the administrative process has not been completed, the regulations are not reviewable at this time.*—The rule that "no one is entitled to judicial relief for a supposed or threatened injury until the prescribed administrative remedy has been exhausted" is "one of judicial administration," "and not merely a rule governing the exercise of discretion" *Myers* v. *Bethlehem Shipbuilding Corp.*, 303 U. S. 41, 50–51, and cases cited. It applies to "proceedings at law as well as suits in equity" *ibid.* It is thus applicable to cases under the Urgent Deficiencies Act just as to all other suits for injunctive relief.

In *Rochester Telephone Corp.* v. *United States*, 307 U. S. 125, which involved an order of the Federal Communications Commission and arose under the Urgent Deficiencies Act, the Court pointed out that the rule was derived in part from Article III of the Constitution with its limitation of judicial power to the determination of cases and controversies, and in part from "the procedural philosophy pertaining to the federal courts whereby, ever since the first Judiciary Act, Congress has been loath to authorize review of interim steps in a proceeding" (307 U. S., at 131). The *Rochester* opinion describes a classification in which judicial

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new authorizations involving the use of critical materials unless the applicant could show that the new station would provide primary service to an area no substantial part of which already receives such service. See also p. 35, *infra*.

review is not permissible in terms which plainly encompass the case at bar (307 U. S., at 130):

> In group (1) the order sought to be reviewed does not of itself adversely affect complainant but only affects his rights adversely on the contingency of future administrative action. In view of traditional conceptions of federal judicial power, resort to the courts in these situations is either premature or wholly beyond their province.

The *Rochester* opinion then refers to and quotes from *United States* v. *Los Angeles R. R.*, 273 U. S. 299, as follows (307 U. S. at 130–131):

> The governing considerations which keep such orders without the area of judicial review were thus summarized for the Court by Mr. Justice Brandeis in denying reviewability of a "final valuation" under the Valuations Act * * *: "The so-called order here complained of is one which does not command the carrier to do, or to refrain from doing, anything; which does not grant or withhold any authority, privilege or license; which does not subject the carrier to any liability, civil or criminal; which does not change the carrier's existing or future status or condition; which does not determine any right or obligation." *United States* v. *Los Angeles & S. L. R. Co.*, 273 U. S. 299, 309, 310.

Since the regulations in the present case do not contain a command, deny a license, change a status, or determine any right, or liability, the above

language is plainly applicable.[42] Not until the administrative process is completed by denial of an application for a license will the time have arrived for judicial intervention. See also *Delaware & Hudson Co.* v. *United States,* 266 U. S. 438.

Other decisions likewise hold that administrative rulings of an intermediate character which do not have final legal effect are not subject to judicial review. Thus, the designation of a matter for hearing is not the type of administrative action which courts will review. *United States* v. *Illinois Central R. R.,* 244 U. S. 82; *Federal Power Comm'n.* v. *Edison Co.,* 304 U. S. 375. This result follows *a fortiori* in the instant cases, where applications have not even yet been designated for hearing but the Commission has merely adopted regulations under which certain applications would thereafter be designated for hearing.

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[42] The carrier in the *Los Angeles* case argued that jurisdiction could be entertained both under the Urgent Deficiencies Act and "under the general equity power of the court" (273 U. S. at 314). This Court rejected both arguments; in answering the latter it declared (273 U. S. at 314–315):

"No basis is laid for relief under the general equity powers. The investigation was undertaken in aid of the legislative purpose of regulation. In conducting the investigation, and in making the report, the Commission performed a service specifically delegated and prescribed by Congress. Its conclusions, if erroneous in law, may be disregarded. But neither its utterances, nor its processes of reasoning, as distinguished from its acts, are a subject for injunction. * * *"

And where the administrative action in question consists as it does here of a mere announcement as to policy, it is particularly true that the courts will not intervene prior to the completion of the administrative process. Cf. *Ashwander* v. *Valley Authority*, 297 U. S. 288, 324; *John P. Agnew Co.* v. *Hoage*, 99 F. (2d) 349 (App. D. C.); *Standard Oil Co.* v. *Board of Purification of Waters*, 43 R. I. 336, 111 Atl. 887.

Appellants, however, argue that the chain broadcasting regulations have present legal effect. Both NBC (Br. 35) and CBS (Br. 44) suggest that a violation of the regulations would be the basis for a revocation proceeding pursuant to Section 312 (a) of the Communications Act, since that section provides that a license may be revoked "for violation of or failure to observe any of the restrictions and conditions of this Act or of any regulation of the Commission authorized by this Act." But operation of a station under an affiliation contract which does not conform to the rules would not provide a basis for revocation under the clause quoted, since the regulations do not prescribe rules of conduct with which licensees must comply. Obviously this is the case, because only the Commission can violate a regulation which provides that "no license shall be granted." Therefore, proof of operation under an affiliation contract which did not conform to the rules, without more, would

not furnish a basis for revocation.[43] For the same reason it would not expose the licensee to the criminal penalties provided in Section 502 of the Act for violation of Commission rules.

Appellants also assert (NBC Br. 23–25, 36; CBS Br. 44–45) that the Commission phrased its regulations as it did in an attempt to confine judicial review to appeals from orders entered in licensing proceedings. There is no basis for this assertion. If the Commission had not phrased its regulations in terms of "no license shall be granted," licensees with network affiliation contracts would have been forced immediately to alter their contracts or be subjected to criminal penalties. Moreover, regulations of the sort involved in this case are a cus-

[43] Operation of a station under an affiliation contract which does not conform to the rules might, however, constitute a basis for revocation under another portion of Section 312 (a) which authorizes the Commission to revoke a license "because of conditions revealed by such statements of fact as may be required from time to time which would warrant the Commission in refusing to grant a license on an original application." Under this clause, however, the Commission could not revoke merely because a regulation was not being complied with. On the contrary, the test would be exactly the same as in renewal proceedings, and the licensee could successfully contest the revocation if he could show that the regulations were unreasonable as applied to him, or that for any other reason his continued operation would be in the public interest despite the inclusion in his affiliation contract of clauses which did not conform to the chain broadcasting regulations. In any event, as indicated in the Commission's Minute of October 31, 1941, the renewal procedure will be followed (NBC R. 437; CBS R. 461).

tomary way by which the Commission announces policy rules as a guide to its licensing functions. For example, the regulations announcing the Commission's policy with respect to the showing it will require before it will issue a license for a new standard, international, high frequency or television broadcast station are similarly phrased.[44] On the other hand, regulations such as those which require licensees to maintain their assigned frequency, power, and hours of operation; which direct them to keep program and operating logs; and which specify the manner in which a station must identify itself by announcing its call letters at regular intervals are phrased in the form of direct commands or prohibitions.[45]

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[44] Regulations 3.24, 4.42, 4.112, and 4.223.

For other examples of regulations announcing licensing policies see regulations 2.77 (use of apparatus employing damped wave emissions); 4.32 (restrictions on licensing of "studio-transmitter" stations); 4.132 (a) (showing required for licensing of noncommercial educational broadcast stations); 4.152 (showing required for licensing of developmental broadcast station); 5.12, 5.52, 5.72, and 5.92 (showing required for licensing of Class 1, Class 2, or Class 3 experimental stations), and 12.62 (restrictions on licensing of amateur station licenses).

[45] Regulations 3.251, 3.252, 3.261, 3.404, 3.406. For other examples of similar regulations see 3.43 (prohibition against changing number of vacuum tubes to tubes of different power rating or class of operation or to change system of modulation); 3.45 (c) (prohibition against changing height of transmitter or making substantial changes in radiating system); 3.408 (d) (prohibition against rebroadcast of programs without first obtaining permission), and 12.63 (pro-

It is further argued that the fact that a comprehensive investigation was made before the regulations were issued (NBC Br. 25–26) and the fact that their effective date has been postponed from time to time (NBC Br. 33–34; CBS Br. 43) show that the regulations were intended to be and are regarded by the Commission as something more than mere declarations of policy. However, the wide scope and thoroughness of the Commission's investigation simply show the Commission's desire to be fully informed before formulating a policy. The orders of postponement are likewise without significance because their sole effect has been to defer the date when the Commission will begin to insist that these issues be dealt with in applications for renewal.[46]

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hibition against location of amateur radio station on premises controlled by an alien). Rules 3.230 and 4.226, relating to multiple ownership of frequency modulation and television broadcast stations, respectively, are also phrased as mandatory directions to licenses, but have the same legal effect as the rules cited in Note 44, *supra*, since they can relate only to the issuance of licenses.

[46] NBC also argues (Br. 28–29) that the precise draftsmanship of the regulations and the Commission's reliance on Section 303 (i) of the Communications Act show that the regulations are intended to be final in nature. These arguments seem utterly insubstantial. The regulations were phrased precisely, where it was possible to do so, in order that the policy should be clearly expressed. But obviously the application of these policies is subject to the general standard of "public interest, convenience, or necessity," in the Communications Act, and the Commission's procedure is

Appellants cite *American T. and T. Co.* v. *United States*, 299 U. S. 232; *Kansas City So. Ry.* v. *United States*, 231 U. S. 432, and *Interstate Commerce Com.* v. *Goodrich Transit Co.*, 224 U. S. 194, in support of their contention that the regulations are reviewable at this time (NBC brief, pp. 15, 23; CBS brief, pp. 47–48). These cases are not in point. They involved suits under the Urgent Deficiencies Act and comparable provisions of the Commerce Court Act challenging the validity of accounting regulations issued by the Federal Communications Commission and the Interstate Commerce Commission respectively. In each case the applicable statute imposed penal sanctions for failure or refusal to keep accounts in the manner prescribed. The administrative action had been completed, and the regulations had immediate legal effect. The carriers were faced with the alternative of complying with the regulations or of incurring criminal penalties. No reason, therefore, existed for refusal to take jurisdiction.

The other cases relied on by appellants (NBC Br. 15, 23, 37; CBS Br. 24, 45, 47–48) in which jurisdiction was entertained by a three-judge court similarly involved administrative orders having

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designed so that there will be full opportunity for the licensee to defend his application under the statutory standard. Section 303 (i) has been relied upon by the Commission as supporting its power to issue these regulations, but, of course, this does not show that the regulations are intended to be anything more than declarations of policy.

immediate legal effect. Thus, in most of these cases, as in the accounting regulations cases discussed above, the order reviewed automatically made effective the sanctions imposed by the act for conduct in violation of its terms. See *Assigned Car Cases*, 274 U. S. 564; *Chicago, R. I. & P. Ry. Co.* v. *United States*, 284 U. S. 80; *United States* v. *B. & O. R. Co.*, 293 U. S. 454; *Powell* v. *United States*, 300 U. S. 276; Interstate Commerce Act, 49 U. S. C. secs. 5 (8), 16 (a) and 20 (7). In the *Chicago Junction Case*, 264 U. S. 258, the order of the Commission made conduct lawful which, but for the order, would have been unlawful.

In relying on the above cases, appellants seem to imply that the Government's position is that the regulations are not reviewable because they are legislative in character. In fact, no such contention is made; the Government's position is that the regulations here attacked are not reviewable because, unlike those involved in the cases just discussed, they contemplated additional administrative action, they have no immediate legal effect, and they carry no sanctions and are not susceptible of violation.

In addition, Columbia relies (Br. 41, 42) on two cases not arising under the Urgent Deficiencies Act—*Waite* v. *Macy*, 246 U. S. 606, and *Euclid* v. *Ambler Co.*, 272 U. S. 365. Both are inapplicable. The statute involved in *Waite* v. *Macy* made no provision for ultimate judicial review of either the

Secretary's regulations or the Tea Board's determinations. Cf. *Buttfield* v. *Stranahan*, 192 U. S. 470, 497. Since the regulations of the Secretary of the Treasury were binding upon the Tea Board, which had no discretion in their enforcement, it was held there was no reason to await the determination of the Tea Board.

In the *Euclid* case the zoning ordinance in question established the zones, and the permissible uses of the property in each zone, and prescribed penalties for violations. The Board of Zoning Inspectors was entrusted with only a limited discretion to alter details in specific cases of practical difficulty or unnecessary hardship, and could not depart from the general zoning scheme set up by the ordinance.[47]

3. *The appellants have an adequate remedy.*—As the court below held (NBC R. 437–438, CBS R. 461–462), the Communications Act provides administrative and judicial procedure whereby the validity and applicability of the chain broadcast-

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[47] Other cases cited by Columbia for the proposition that review at this time is not premature (CBS Br. 40–41) are likewise inapplicable. In *Pierce* v. *Society of Sisters*, 268 U. S. 510, and *Terrace* v. *Thompson*, 263 U. S. 197, the statutes involved were penal, imposing criminal sanctions for engaging in the conduct prohibited. No administrative remedies were made available to any of the persons affected, and there was no doubt as to the impact of the criminal provisions if the acts were permitted to go into effect on the appointed date.

ing regulation can be tested in an orderly manner. Appellants have failed to follow this necessary procedure. *Myers* v. *Bethlehem Corp.*, 303 U. S. 41; *Federal Power Comm'n* v. *Edison Co.*, 304 U. S. 375; *Black River Valley Broadcasts* v. *McNinch*, 101 F. (2d) 235 (App. D. C.), certiorari denied 307 U. S. 623; *Sykes* v. *Jenny Wren Co.*, 78 F. (2d) 729 (App. D. C.), certiorari denied 296 U. S. 624.

As we have pointed out, all of the issues which appellants seek to litigate here may be raised by them—whether licensees or networks—in the future administrative proceedings in which the chain broadcasting regulations can alone be applied. The regulations relating to affiliation contracts can be applied against Woodmen, Stromberg, or other licensees only after their licenses have been set for hearing and hearings have been held. In any such hearings the networks will have an opportunity to intervene under the Commission's intervention rule, *supra*, p. 25, n. 37. Likewise, Regulation 3.106, relating to the operation of stations by networks, can be applied against the networks only in a proceeding involving a hearing on the license of the network-operated station involved. In such a proceeding the network organization itself will be a party as the licensee.[48]

[48] In fact NBC appears to concede (Br. 27) that so far as Regulation 3.106 is concerned the court below was without

Appellants attempt to avoid the effect of the familiar rule as to the necessity for completing the administrative process before the courts will assume to review administrative action on the ground that the administrative remedy which remains is inadequate. They contend that unless *all* stations choose to contest the regulations in license proceedings before the Commission, the networks will suffer immediate injury.

The networks state (NBC Br. 43, 45; CBS Br. 31) that some of their affiliates have sought or will seek to amend their contracts so as to conform to policies declared in the regulations, and that they will be injured unless all network affiliates contest the regulations.[49] However, as has been stated, licensees are not threatened with the imposition of any sanction if they wish to contest the regulations. Even if a station should notify the Commission that it has unilaterally modified its network contract, it would not follow, as appellants suggest (NBC Br. 44; CBS Br. 28–30) that the Commission would automatically grant a license renewal without holding a hearing. There is no reason to suppose that the Commission would accept the unilateral statement

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jurisdiction of its suit. And by the same token the court had no jurisdiction of the suits brought by NBC's co-plaintiffs, Woodmen of the World and Stromberg-Carlson.

[49] This argument, obviously, is not available to plaintiffs Woodmen and Stromberg, who are themselves licensees, nor is it relevant with respect to Regulation 3.106, which affects the networks only in their capacity as licensees.

of one of the parties that the contract had been modified. The Commission might well set the renewal application for hearing in order to determine whether the station was actually in a position to operate in accordance with the chain broadcasting regulations.

In any event, if affiliated stations insist upon altering their present contractual relationships, that is an act of their own choice and not a result in any way commanded or compelled by the regulations. Any injury thereby inflicted by the affiliated station on the network would not flow from any legal force or effect of the regulations, but would be incidental consequences which would not render the regulations here justiciable. Interim administrative action frequently has incidental consequences which do not constitute legal injury. *United States* v. *Los Angeles & S. L. R. R.*, 273 U. S. 299; *Brooklyn Eastern District Terminal* v. *United States*, 27 F. (2d) 634, 636 (S. D. N. Y.); *Securities and Exchange Commission* v. *Electric Bond & Share Co.*, 18 F. Supp. 131, 148 (S. D. N. Y.), affirmed 92 F. (2d) 585–592 (C. C. A. 2), affirmed 303 U. S. 419; *Myers* v. *Bethlehem Shipbuilding Corp.*, 303 U. S. 41, 47–48.

The *Los Angeles* case involved a final valuation order of the Interstate Commerce Commission. The plaintiff railroad pointed out (p. 304) that the Commission had valued its property at an amount less than its outstanding liabilities in mortgage

bonds; that the ordinary conduct of its railroad business required continued expenditures for additions and betterments, and alleged that it could not raise additional capital by public borrowing, or subscription to stock, in the face of the valuation. Accordingly, the plaintiff urged that (p. 314): "Since the Commission has by reason of errors of law and of judgment grossly undervalued the property, its report will, unless suppressed, injure the credit of the carrier with the public." This Court held that such injury did not make the order reviewable.

The same type of situation is presented here. The Commission has promulgated regulations embodying the policy which it intends to apply in its licensing function. If licensees, despite the assurances the Commission has given them that they may litigate the validity of the regulations without fear of loss of license, nonetheless refrain from entering into affiliation contracts which do not conform to the rules, their action must be considered an incidental consequence of the regulations of the same type as that involved in the valuation order in the *Los Angeles* case.

If the fact that the regulations may have some effect on NBC and CBS were held sufficient to confer jurisdiction on the courts, the presumable result would be that few policy declarations of any federal regulatory agency, whether embodied in regulations, opinions, or otherwise, would be im-

mune from injunctive attack. The magnitude of the task which would be thrown on the courts by any such relaxation of the prerequisites hitherto prevailing for judicial review, and the corresponding breakdown of administrative process which would ensue, adequately explain why the courts have insisted that administrative action be final in nature before judicial review is available.

4. *The argument of appellant Columbia that there may be no administrative proceeding in which it may contest the Commission's regulations is merely theoretical and, in any event, irrelevant.*— In addition appellant Columbia suggests (Br. pp. 27–30, 32–33) that the opportunity may never arise for them to participate in subsequent administrative proceedings. This argument is predicated on the assumption that it is possible that no station will challenge the regulations or that if any station does contest, appellant networks will not be permitted to intervene. Neither of these assumptions is warranted.

CBS suggests (Br. 27–30) that its affiliated stations might all fail to contest the Commission's order and in that event there would be no administrative proceedings in which CBS could intervene. NBC is not in a position to make such a contention because two of its affiliates have demonstrated their willingness to litigate by joining as co-plaintiffs in this injunctive suit. And indeed, there is no reason to suppose that stations will not

litigate.[50] The volume of litigation in which Commission orders have been attacked does not suggest any fear on the part of licensees that they would thereby incur the Commission's displeasure.[51]

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[50] It is difficult to believe that CBS seriously fears that none of its affiliates will litigate. In this connection, it should be noted that CBS joined in appellant's proposal (referred to in the NBC brief at p. 48) that the Commission voluntarily stay the chain broadcasting regulations "pending a determination of its power in a test licensing proceeding and appeal therefrom under Section 402 (b)." Of course, CBS could not have made such an offer had none of its affiliates been willing to contest the validity of the rules.

[51] The Commission's reported decisions show that since 1934 there have been 1,721 instances where licensees have litigated before the Commission with respect to matters other than their own applications. Similarly, there have been 55 instances during the last eight years where licensees have appealed to the courts on such matters.

Furthermore, the theory of Section 402 (b) (2) of the Communications Act, as stated in *Federal Communications Commission* v. *Sanders Radio Station*, 309 U. S. 470, and in *Scripps-Howard Radio, Inc.* v. *Federal Communications Commission*, 62 S. Ct. 875, is that persons other than applicants, who are aggrieved or adversely affected by Commission action on the applications of others, are the very persons who are expected to litigate such action in order to protect the public interest by laying bare errors of law in the Commission's decisions. In the usual case, such aggrieved persons will be other licensees, and indeed they were licensees in the two cases cited above, and were licensees or applicants in the 55 cases cited above, where the appeals were taken under section 402 (6) (2). If one were to take seriously Columbia's argument (Br. 30) that stations are reluctant "to incur the displeasure of the Commission," the procedure thus devised by the Congress would be brought to naught.

The Commission's Minute of October 31, 1941, assures them that they may contest the regulations both before the Commission and in the Court of Appeals without jeopardizing their right to stay on the air.

But assuming that some licensees will contest, CBS further argues (Br. pp. 32–33) that there is no assurance that they will be permitted to intervene. However, under the Commission's intervention rule (Regulation 1.102, p. 25, n. 37, *supra*), as a matter of administrative practice [52] persons in a position similar to that of the networks have either been made parties in Commission proceedings or have been permitted to intervene therein.[53]

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[52] See, e. g., Petition of Glen D. Gillett and G. S. Wassmer to intervene in the hearing on application of E. J. Regan and F. Arthur Bostwick, d/b as Regan and Bostwick for renewal of license (Docket 5788); Petition of Glen D. Gillett to intervene in hearing on application of John H. Stenger, Jr., for renewal of license (Docket 5430); Petition of Voice of Alabama, Inc., to intervene in a hearing on application of WAPI for renewal of license (Docket 5821); Petition of Southern Broadcasting Stations, Inc., to intervene in hearing of Georgia School of Technology for renewal of license (Docket 5903); Petition of John H. Perry to intervene in hearing on revocation of license of Panama City Broadcasting Company (Docket 6001); and Petition of John H. Perry to intervene in hearing on revocation of license of Ocala Broadcasting Co. (Docket 6000).

[53] The court below stated that an unreasonable refusal of a petition to intervene would be a good objection on appeal under Section 402 (b) (2), (NBC R. 438; CBS R. 462); *Federal Communications Commission* v. *Pottsville Broadcasting Co.*, 309 U. S. 134, cited in the CBS brief (p. 33), contains nothing to the contrary.

Even indulging the theoretical assumption that no Columbia affiliate whatsoever will contest the regulations, there would be no basis for taking jurisdiction of these suits. The administrative remedy is open to the licensees, upon whom the regulations directly operate; and the administrative process has not been completed. In such circumstances courts will not, by intervention at an early stage, prevent an orderly conclusion of the administrative processes, even though incidental injury may be suffered in the interim. See cases *supra*, page 42. No analogy can be drawn to such cases as *Pierce* v. *Society of Sisters*, 268 U. S. 510, and *Truax* v. *Raich*, 239 U. S. 33. For in those cases the challenged statutes were penal and contained no provision whereby those whose conduct was made criminal might test the validity or applicability of the statutes through further administrative proceedings. Hence, it was held that suits in equity might be maintained by parties sufficiently affected. *Cf. Ex Parte Young*, 209 U. S. 123.[54] In

[54] "Another obstacle to making the test on the part of the company might be to find an agent or employee who would disobey the law, with a possible fine and imprisonment staring him in the face if the act should be held valid. Take the passenger-rate act, for instance: A sale of a single ticket above the price mentioned in that act might subject the ticket agent to a charge of felony, and, upon conviction, to a fine of $5,000 and imprisonment for five years. It is

contrast, the Communications Act and the Commission's Minute referred to above offer a ready method whereby the rules can be tested by the licensees directly affected without peril to themselves.[55]

5. *Lack of finality is an insuperable obstacle to judicial review of the regulations at this time, whether in a statutory court or before a single district judge.*—Both of the appellants appear to be under the impression (NBC Br. 23–25, 37; CBS Br. 23–24, 35, 42) that the Government's position hinges upon a notion that the statutory court lacks jurisdiction because the regulations, for some reason other than lack of finality, do not fall within the meaning of the term "any order" as used in the Urgent Deficiencies Act. We make no such contention. On the contrary, the Government's po-

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true the company might pay the fine, but the imprisonment the agent would have to suffer personally. It would not be wonderful if, under such circumstances, there would not be a crowd of agents offering to disobey the law. The wonder would be that a single agent should be found ready to take the risk." *Ex Parte Young*, *supra*, at pages 163–164.

[55] "The Act makes such careful provision for judicial review of the orders of the Commission and for postponing the incidence of penalties or other liabilities until after such review can be had, that there could never be occasion for invoking in respect to this statute the doctrine of *Ex Parte Young*, 209 U. S. 123." Mr. Justice Brandeis, dissenting, in *Pennsylvania* v. *West Virginia*, 262 U. S. 553, 613, 614.

sition is that the regulations have no immediate legal effect, that "the conventional requisites of equity jurisdiction" are not present,[56] and that therefore no court—be it a statutory court under the Urgent Deficiencies Act or a single judge sitting in equity—would have jurisdiction at the present stage of the proceedings.

Indeed, if the regulations were sufficiently final to be the subject of judicial review at this time, we believe that such review could be had only in a three-judge court under the Urgent Deficiencies Act, which contemplated that the parties in such cases be entitled to the protection involved in the participation of three judges and the benefits of the expeditious procedure prescribed by that Act.[57] This procedure and these safeguards were provided for suits to set aside orders of the Interstate Commerce Commission by the Hepburn Act of 1906, 34 Stat. 584, 590–592, which made applicable to such suits the provisions of the Expediting Act of 1903, 32 Stat. 823, for three-judge circuit courts and direct appeal to the Supreme Court. The Mann-Elkins Act of 1910, 36 Stat. 539, transferred

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[56] See *Rochester Tel. Corp.* v. *United States*, 307 U. S. 125, 132.

[57] The opinion of the court below suggests but does not decide that the appellants might obtain review before a single judge sitting in equity, presumably in the United States District Court for the District of Columbia (NBC R. 435–436; CBS R. 460).

jurisdiction of such suits from the circuit courts to the Commerce Court where similar protection was provided. In 1913 the Commerce Court was abolished and its jurisdiction over such suits was transferred by the Urgent Deficiencies Act to three-judge district courts, 38 Stat. 208, 219–221. The legislative history of these acts indicates that Congress considered *all* suits to set aside Interstate Commerce Commission action of sufficient national interest and public importance [58] to warrant review in the first instance by a court of three judges (or the Commerce Court of five judges) and a direct appeal to the Supreme Court.[59] Nowhere in the

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[58] In *United States* v. *Griffin*, 303 U. S. 226, it is suggested (pp. 233, 234) that jurisdiction under the Urgent Deficiencies Act extends only to cases of "public importance." While we find no indication in the legislative history that Congress intended to exclude, as unimportant, cases which would otherwise fall within the scope of the Urgent Deficiencies Act, the question is clearly academic in the present case, which is admittedly of public importance.

[59] *Expediting Act:* H. Rep. 3020, 57th Cong., 2d sess., pp. 1–2; 36 Cong. Rec. p. 1679; H. Rep. 1416, 61st Cong., 2d sess., p. 1.

Hepburn Act: H. R. 12987, 59th Cong., 1st sess., as introduced on January 24, 1906; H. Rep. 591, 59th Cong., 1st sess., p. 5; S. Rep. 1242, 59th Cong., 1st sess., pt. I, pp. 1–4, pt. II, pp. 8–9; 40 Cong. Rec. 1769, 1982, 3446–3447, 4444, 4563–4566, 6320, 6501 et seq., 6691–6692.

Mann-Elkins Act: H. R. 17536, 61st Cong., 2d sess., as introduced on January 10, 1910; H. Rep. 923, 61st Cong., 2d sess., pp. 1–7; S. 6737, 61st Cong., 2d sess.; S. Rep. 355, 61st Cong., 2d sess., pp. 1–7; 45 Cong. Rec. p. 3467–3468, 4572–4573, 5232; President Taft's Special Message to Congress, January 7, 1910; Hearings, H. Committee on Inter-

legislative history of these acts is there any indication that Congress intended to leave any class or group of suits to set aside action of the Interstate Commerce Commission in the hands of a single judge and subject to the longer procedure of appeals via the circuit court of appeals. The adoption of the provisions of the Urgent Deficiencies Act by section 402 (a) of the Communications Act indicates the intent of Congress to provide the same procedure in all suits to set aside Federal Communications Commission action, except those which may be reviewed in the Court of Appeals under section 402 (b).

The only case in which a one-judge court has been held to have jurisdiction after a court established under the Urgent Deficiencies Act has been held to be without jurisdiction, is *Shields* v. *Utah Idaho R. Co.*, 305 U. S. 177. In that case a finding of the Interstate Commerce Commission that the railroad was not an interurban road, and was therefore subject to the Railway Labor Act, was reviewed after it had been held in *Shannahan* v. *United States*, 303 U. S. 596, that such a determination was not an order within the meaning of the Urgent Deficiencies Act. The *Shannahan* case rested in part on the view that the determination

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state Commerce, 61st Cong., 2d sess., pt. XXII, pp. 1257–1260; Hearings, S. Committee on Interstate Commerce, S. 3776 and S. 5106, 61st Cong., 2d sess., pp. 201–204.

Urgent Deficiencies Act: 48 Cong. Rec. pp. 7955–7956.

was an interim step preliminary to further administrative action by the Mediation Board. See *Rochester Tel. Corp.* v. *United States*, 307 U. S. 125, 130. To the extent that the *Shannahan* case relied on *Lehigh Valley R. R. Co.* v. *United States*, 243 U. S. 412 and the negative order doctrine generally, it is, of course, overruled by this Court's decision in the *Rochester* case.

If official action by the Interstate Commerce Commission or other agency may, as the *Shannahan* and *Shields* cases taken together suggest, sometimes be reviewed in a statutory court and some times before a single district judge, the whole purpose of the Urgent Deficiencies Act is frustrated. Particularly is this true in any situation where there is doubt as to which is the proper court, since, contrary to the purpose of that act, enforcement of orders is then exposed to the possibility of double delay where a restraining order or injunction is obtained from the wrong court, and, after a subsequent dismissal of the bill for lack of jurisdiction, a temporary injunction is obtained from the proper court.

In any event, it is our position that the reasons which preclude attack upon the regulations in this case would apply to any equity proceeding, whether in a statutory three-judge court or before a single district judge. As shown heretofore, the rules are not final but are declarations of policy to be applied in subsequent administrative pro-

ceedings and accordingly are not subject to attack in any equity case.

6. *Review of the regulations under Section 402 (b) is the appropriate method.*—As this Court said in *Federal Communications Comm.* v. *Pottsville Broadcasting Co.*, 309 U. S. 134, 138, underlying the whole Communications Act there is "recognition of the rapidly fluctuating factors characteristic of the evolution of broadcasting and of the corresponding requirement that the administrative process possess sufficient flexibility to adjust itself to these factors." This principle is no less important with respect to the network operations of broadcast stations than with respect to their other services. Recognizing the importance of this principle in evolving for the first time policies in the chain broadcasting field, the Commission did not undertake to frame regulations carrying penal consequences and which would have required immediate revision of affiliation contracts under the threat of criminal penalties. Instead, it framed regulations which would serve as a guide to applicants and other interested parties, stating the policies which it proposed to implement and develop in the course of its licensing functions. As has been shown (see p. 35, *supra*), this is a customary procedure; the Commission has often resorted to regulations of this sort in the broadcasting field. Commission action granting or denying licenses pursuant to such rules has often been challenged in the Court of Appeals for the District of Columbia un-

der the specific statutory provisions for review of such action, but such rules have never before been attacked by a suit in equity for an injunction and, so far as we are aware, no analogous suit has ever been entertained by the courts.

To be sure, the Commission believes that the regulations here attacked are warranted by the evidence produced by its investigation, and will serve public interest, convenience, and necessity. There is a strong likelihood that they will be followed in proceedings on particular license applications. But there is no warrant for the suggestion in appellants' briefs that the regulations will be applied inflexibly, that amendments will not be made upon convincing showing, or that the further administrative proceedings in which they are to be applied are a mere formality.

It is settled that "one who is required to take out a license will not be heard to complain, in advance of application, that there is danger of refusal." *Highland Farms Dairy* v. *Agnew*, 300 U. S. 608, 616; *Lehon* v. *Atlanta*, 242 U. S. 53, 56; *Bourjois Inc.* v. *Chapman*, 301 U. S. 183, 188; *Pacific Tel. Co.* v. *Seattle*, 291 U. S. 300, 303–304. As shown by the Supplemental Report (NBC R. 201–217; CBS R. 20–36), the rules have already been substantially modified as a result of a petition by the Mutual Broadcasting System. Likewise, the Commission's Reports and its Minute make it perfectly clear that in the future administrative proceedings

the reasonableness of applying the rules in the particular case will be fully considered.[60] Indeed, appellant Columbia declares in its brief (p. 9) that the manner in which Regulation 3.105 is applied is determinative of the reasonableness of the rule. Since the rules can only be applied on a case-to-case basis, it is not only appropriate but highly desirable that any court review of the regulations be on the same basis. Such review is available in the Court of Appeals for the District of Columbia under Section 402 (b) of the Act.

In contrast, these suits are an endeavor by the appellants to secure from the courts a general declaration that the chain broadcasting regulations are invalid. See dissenting opinion of Mr. Justice Brandeis in *Pennsylvania* v. *West Virginia*, 262 U. S. 553, 610. Cf. *Ashwander* v. *Tennessee Valley*

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[60] *Supra*, pp. 26, 28. Both the Report and the Supplemental Report point out that the application of the regulations with respect to regional networks will be largely governed by the facts shown in future proceedings. (NBC R. 115, 212; CBS R. 31–32, 135.)

To illustrate further that the administrative proceedings are substantial and not merely formal, it may be supposed that licensees in some of the larger cities with five or more radio stations request that the rule against exclusive affiliation (3.101) or the option-time rule (3.104) be waived or modified as applied to them. Some of the reasons which underlie each of these rules are of peculiar importance in cities with four or less stations. (*Supra*, p. 16.) If a convincing showing were made of the need for modification or waiver of these regulations in such cases, the Commission would, of course, be governed accordingly.

Authority, 297 U. S. 288; *Electric Bond & Share Co.* v. *Securities Exchange Commission*, 303 U. S. 419, 443. While the rules embody general policies, the policies may not be found appropriate in particular cases. Appellants challenge the reasonableness of the rules, but the rules may be reasonable as applied to one applicant and unreasonable as applied to another. Accordingly, not only would the entertainment of these suits be contrary to established principles of jurisdiction, as shown heretofore, but the court below is not the proper forum for review of the type of rules which the Commission has promulgated.

Furthermore, if the Chain Broadcasting Regulations may be attacked in equity on an over-all footing, it is difficult to see why all other general policy declarations of this Commission—or indeed of other agencies—may not also be so attacked. It would seem equally possible, for example, for an aggrieved manufacturer of radio equipment holding a contract with a licensee or applicant, or other interested party, to attack the Commission's general allocation plan,[61] or the policy which it has declared with respect to the authorization of new or improved broadcast facilities during the period of war emergency.[62]

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[61] *Supra*, pp. 8–10.

[62] *Supra*, pp. 29–30.

The entertainment of these suits, accordingly, would seriously impede the development of intelligent and responsible administrative processes by impelling administrative agencies not to disclose by general statements or pronouncements, in advance of case by case adjudication, the policies which they intend to follow. The Government believes that the formulation and publication of administrative policies is advantageous not only to those who do business with an agency but to the agency itself." To hold that such policies may be attacked on a sweeping basis prior to their application in particular cases would choke off this beneficial administrative trend.

"See *Final Report of the Attorney General's Committee on Administrative Procedure*, pp. 26–27:

"Most agencies develop approaches to particular types of problems, which, as they become established, are generally determinative of decisions. Even when their reflection in the actual determinations of an agency has lifted them to the stature of 'principles of decision,' they are rarely published as rules or regulations, though sometimes they are noted in annual reports or speeches or press releases, as well as in the opinions disposing of particular controversies. As soon as the 'policies' of an agency become sufficiently articulated to serve as real guides to agency officials in their treatment of concrete problems, that fact may advantageously be brought to public attention by publication in a precise and regularized form."

CONCLUSION

It is respectfully submitted that the judgments of the district court should be affirmed.

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APRIL 1942.

APPENDIX

A. COMMUNICATIONS ACT OF 1934, AS AMENDED

SECTION 309. (a) If upon examination of any application for a station license or for the renewal or modification of a station license the Commission shall determine that public interest, convenience, or necessity would be served by the granting thereof, it shall authorize the issuance, renewal, or modification thereof in accordance with said finding. In the event the Commission upon examination of any such application does not reach such decision with respect thereto, it shall notify the applicant thereof, shall fix and give notice of a time and place for hearing thereon, and shall afford such applicant an opportunity to be heard under such rules and regulations as it may prescribe.

(b) Such station licenses as the Commission may grant shall be in such general form as it may prescribe, but each license shall contain, in addition to other provisions, a statement of the following conditions to which such license shall be subject:

(1) The station license shall not vest in the licensee any right to operate the station nor any right in the use of the frequencies designated in the license beyond the term thereof nor in any other manner than authorized therein.

(2) Neither the license nor the right granted thereunder shall be assigned or otherwise transferred in violation of this Act.

(3) Every license issued under this Act shall be subject in terms to the right of use or control conferred by section 606 hereof.

SECTION 402. (a) The provisions of the Act of October 22, 1913 (38 Stat. 219), relating to the enforcing or setting aside of the orders of the Interstate Commerce Commission, are hereby made applicable to suits to enforce, enjoin, set aside, annul, or suspend any order of the Commission under this Act (except any order of the Commission granting or refusing an application for a construction permit for a radio station, or for a radio station license, or for renewal of an existing radio station license, or for modification of an existing radio station license, or suspending a radio operator's license) and such suits are hereby authorized to be brought as provided in that Act.

(b) An appeal may be taken, in the manner hereinafter provided, from decisions of the Commission to the Court of Appeals of the District of Columbia in any of the following cases:

(1) By any applicant for a construction permit for a radio station, or for a radio station license, or for renewal of an existing radio station license, or for modification of an existing radio station license, whose application is refused by the Commission.

(2) By any other person aggrieved or whose interests are adversely affected by any decision of the Commission granting or refusing any such application.

(3) By any radio operator whose license has been suspended by the Commission.

(c) Such appeal shall be taken by filing with said court within twenty days after the decision

complained of is effective, notice in writing of said appeal and a statement of the reasons therefor, together with proof of service of a true copy of said notice and statement upon the Commission. Unless a later date is specified by the Commission as part of its decision, the decision complained of shall be considered to be effective as of the date on which public announcement of the decision is made at the office of the Commission in the city of Washington. The Commission shall thereupon immediately, and in any event not later than five days from the date of such service upon it, mail or otherwise deliver a copy of said notice of appeal to each person shown by the records of the Commission to be interested in such appeal and to have a right to intervene therein under the provisions of this section, and shall at all times thereafter permit any such person to inspect and make copies of the appellant's statement of reasons for said appeal at the office of the Commission in the city of Washington. Within thirty days after the filing of said appeal the Commission shall file with the court the originals or certified copies of all papers and evidence presented to it upon the application or order involved, and also a like copy of its decision thereon, and shall, within thirty days thereafter, file a full statement in writing of the facts and grounds for its decision as found and given by it, and a list of all interested persons to whom it has mailed or otherwise delivered a copy of said notice of appeal.

(d) Within thirty days after the filing of said appeal any interested person may intervene and participate in the proceedings had upon said appeal by filing with the court a notice of intention

to intervene and a verified statement showing the nature of the interest of such party, together with proof of service of true copies of said notice and statement, both upon appellant and upon the Commission. Any person who would be aggrieved or whose interests would be adversely affected by a reversal or modification of the decision of the Commission complained of shall be considered an interested party.

(e) At the earliest convenient time the court shall hear and determine the appeal upon the record before it, and shall have power, upon such record, to enter a judgment affirming or reversing the decision of the Commission, and in event the court shall render a decision and enter an order reversing the decision of the Commission, it shall remand the case to the Commission to carry out the judgment of the court: *Provided, however,* That the review by the court shall be limited to questions of law and that findings of fact by the Commission, if supported by substantial evidence, shall be conclusive unless it shall clearly appear that the findings of the Commission are arbitrary or capricious. The court's judgment shall be final, subject, however, to review by the Supreme Court of the United States upon writ of certiorari on petition therefor under section 240 of the Judicial Code as amended, by appellant, by the Commission, or by any interested party intervening in the appeal.

(f) The court may, in its discretion, enter judgment for costs in favor of or against an appellant, and/or other interested parties intervening in said appeal, but not against the Commission, depending

upon the nature of the issues involved upon said appeal and the outcome thereof.

B. THE URGENT DEFICIENCIES ACT OF OCTOBER 22, 1913, 38 STAT 219, AS SET FORTH IN 28 U. S. C. § 47

Injunctions as to orders of Interstate Commerce Commission; appeal to Supreme Court; time for taking.—No interlocutory injunction suspending or restraining the enforcement, operation, or execution of, or setting aside, in whole or in part, any order made or entered by the Interstate Commerce Commission shall be issued or granted by any district court of the United States, or by any judge thereof, or by any circuit judge acting as district judge, unless the application for the same shall be presented to a circuit or district judge, and shall be heard and determined by three judges, of whom at least one shall be a circuit judge, and unless a majority of said three judges shall concur in granting such application. When such application as aforesaid is presented to a judge, he shall immediately call to his assistance to hear and determine the application two other judges. Said application shall not be heard or determined before at least five days' notice of the hearing has been given to the Interstate Commerce Commission, to the Attorney General of the United States, and to such other persons as may be defendants in the suit: *Provided,* That in cases where irreparable damage would otherwise ensue to the petitioner, a majority of said three judges concurring, may, on hearing, after not less than three days' notice to the Interstate Commerce Commission and the Attorney General, allow a temporary stay or suspension, in whole or in part, of the operation of the

order of the Interstate Commerce Commission for not more than sixty days from the date of the order of said judges pending the application for the order or injunction, in which case the said order shall contain a specific finding, based upon evidence submitted to the judges making the order and identified by reference thereto, that such irreparable damage would result to the petitioner and specifying the nature of the damage. The said judges may, at the time of hearing such application, upon a like finding, continue the temporary stay or suspension in whole or in part until decision upon the application. The hearing upon such application for an interlocutory injunction shall be given precedence and shall be in every way expedited and be assigned for a hearing at the earliest practicable day after the expiration of the notice hereinbefore provided for. An appeal may be taken direct to the Supreme Court of the United States from the order granting or denying, after notice and hearing, an interlocutory injunction, in such case if such appeal be taken within thirty days after the order, in respect to which complaint is made, is granted or refused; and upon the final hearing of any suit brought to suspend or set aside, in whole or in part, any order of said commission the same requirement as to judges and the same procedure as to expedition and appeal shall apply.

C. THE CHAIN BROADCASTING REGULATIONS

SEC. 8.101. *Exclusive affiliation of station.*—No license shall be granted to a standard broadcast station having any contract, arrangement, or understanding, express or implied, with a network or-

ganization [1] under which the station is prevented or hindered from, or penalized for, broadcasting the programs of any other network organization.

SEC. 3.102. *Territorial exclusivity.*—No license shall be granted to a standard broadcast station having any contract, arrangement, or understanding, express or implied, with a network organization which prevents or hinders another station serving substantially the same area from broadcasting the network's programs not taken by the former station, or which prevents or hinders another station serving a substantially different area from broadcasting any program of the network organization. This regulation shall not be construed to prohibit any contract, arrangement, or understanding between a station and a network organization pursuant to which the station is granted the first call in its primary service area upon the programs of the network organization.*

SEC. 3.103. *Term of affiliation.*—No license shall be granted to a standard broadcast station having any contract, arrangement, or understanding, expressed or implied, with a network organization which provides, by original term, provisions for

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[1] The term "network organization" as used herein includes national and regional network organizations.

**Regulation 3.102, as originally promulgated, read as follows:*

"No license shall be granted to a standard broadcast station having any contract, arrangement, or understanding, express or implied, with a network organization which prevents or hinders another station serving substantially the same area from broadcasting the network's programs not taken by the former station, or which prevents or hinders another station serving a substantially different area from broadcasting any program of the network organization."

renewal, or otherwise for the affiliation of the station with the network organization for a period longer than two years: *Provided,* That a contract, arrangement, or understanding for a period up to two years, may be entered into within 120 days prior to the commencement of such period.*

SEC. 3.104. *Option time.*—No license shall be granted to a standard broadcast station which options [2] for network programs any time subject to call on less than 56 days' notice, or more time than a total of three hours [3] within each of four segments of the broadcast day, as herein described. The

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**Regulation 3.103, as originally promulgated, read as follows:*

"No license shall be granted to a standard broadcast station having any contract, arrangement, or understanding, express or implied, with a network organization which provides, by original term, provisions for renewal, or otherwise, for the affiliation of the station with the network organization for a period longer than one year: Provided, That a contract, arrangement, or understanding for a one-year period, may be entered into within sixty days prior to the commencement of such one-year period."

[2] As used in this section, an option is any contract, arrangement, or understanding, express or implied, between a station and a network organization which prevents or hinders the station from scheduling programs before the network agrees to utilize the time during which such programs are scheduled, or which requires the station to clear time already scheduled when the network organization seeks to utilize the time.

[3] All time options permitted under this section must be for specified clock hours, expressed in terms of any time system set forth in the contract agreed upon by the station and network organization. Shifts from daylight-saving to standard time or vice versa may or may not shift the specified hours correspondingly as agreed by the station and network organization.

broadcast day is divided into 4 segments, as follows: 8:00 a. m. to 1:00 p. m.; 1:00 p. m. to 6:00 p. m.: 6:00 p. m. to 11:00 p. m.; 11:00 p. m. to 8:00 a. m.[4] Such options may not be exclusive as against other network organizations and may not prevent or hinder the station from optioning or selling any or all of the time covered by the option, or other time, to other network organizations.**

SEC. 3.105. *Right to reject programs.*—No license shall be granted to a standard broadcast station having any contract, arrangement, or understanding, express or implied, with a network organization which (a), with respect to programs offered pursuant to an affiliation contract, prevents or hinders the station from rejecting or refusing network programs which the station reasonably believes to be unsatisfactory or unsuitable; or which (b), with respect to network programs so offered or already contracted for, prevents the station from rejecting or refusing any program which, in its opinion, is contrary to the public interest, or from substituting a program of outstanding local or national importance.

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[4] These segments are to be determined for each station in terms of local time at the location of the station but may remain constant throughout the year regardless of shifts from standard to daylight-saving time or vice versa.

***Regulation 3.104, as originally promulgated, read as follows:*

"No license shall be granted to a standard broadcast station having any contract, arrangement, or understanding, express or implied, with a network organization which prevents or hinders the station from scheduling programs before the network finally agrees to utilize the time during which such programs are scheduled, or which requires the station to clear time already scheduled when the network organization seeks to utilize the time."

SEC. 3.106. *Network ownership of stations.*—No license shall be granted to a network organization, or to any person directly or indirectly controlled by or under common control [5] with a network organization, for more than one standard broadcast station where one of the stations covers substantially the service area of the other station, or for any standard broadcast station in any locality where the existing standard broadcast stations are so few or of such unequal desirability (in terms of coverage, power, frequency, or other related matters) that competition would be substantially restrained by such licensing.

SEC. 3.107. *Dual network operation.*—No license shall be issued to a standard broadcast station affiliated with a network organization which maintains more than one network: *Provided,* That this regulation shall not be applicable if such networks are not operated simultaneously, or if there is no substantial overlap in the territory served by the group of stations comprising each such network.

SEC. 3.108. *Control by networks of station rates.*—No license shall be granted to a standard broadcast station having any contract, arrangement, or understanding, express or implied, with a network organization under which the station is prevented or hindered from, or penalized for, fixing or altering its rates for the sale of broadcast time for other than the network's programs.

[*Effective date.*] These regulations shall become effective immediately: *Provided,* That, with

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[5] The word "control" as used herein, is not limited to full control but includes such a measure of control as would substantially affect the availability of the station to other networks.

respect to existing contracts, arrangements, or understandings, or network organization station licenses, the effective date shall be deferred until November 15, 1941: *Provided further,* That the effective date of Regulation 3.106 with respect to any station may be extended from time to time in order to permit the orderly disposition of properties; *And provided further,* That the effective date of Regulation 3.107 shall be suspended indefinitely and any further order of the Commission placing said Regulation 3.107 in effect shall provide for not less than six months' notice and for further extension of the effective date from time to time in order to permit the orderly disposition of properties.*

D. THE MINUTE OF OCTOBER 31, 1941

PROCEDURE IN DOCKET NO. 5060

The Commission today adopted the following minute setting forth the procedure that it will follow in applying the policies announced in the Chain Broadcasting Regulations:

If a station wishes to contest the validity of the Chain Broadcasting Regulations adopted in Docket

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**This paragraph, as originally promulgated, read as follows:*

"These regulations shall become effective immediately: Provided, That, with respect to existing contracts, arrangements, or understandings, or network organization station licenses, the effective date shall be deferred for 90 days from the date of this Order: Provided further, That the effective date of Regulation 3.106 may be extended from time to time with respect to any station in order to permit the orderly disposition of properties."

Interim postponements were made on July 22, 1941 and August 28, 1941.

No. 5060, or the reasonableness of their application to the particular station, its license will be set for hearing. In order to insure that the station may remain on the air and be in no way injured by any such Commission proceeding and appeal to court from a decision in such proceeding, the Commission will grant such licensee a temporary extension of its license, with renewals from time to time until there has been a final determination of the issues raised at such hearing. In the event of such litigation, and if the validity of the application of the Chain Broadcasting Regulations to such licensee is sustained by the courts, the Commission will nevertheless grant a regular license to the licensee, otherwise entitled thereto, who has unsuccessfully litigated that issue, if the licensee thereupon conforms to the decision.

The supplementary decision and order in Docket No. 5060 indefinitely suspended Regulation 3.107, relating to the operation of more than one network by a single network organization. No similar suspension was made of that portion of Regulation 3.106, relating to network operation of more than one standard broadcast station with substantially overlapping service areas. The Commission will postpone indefinitely any action to prevent such dual station operation if it is shown that the operation of two stations in any city is indispensable to the continued operation of two networks by a single network organization.

The adoption of the foregoing procedure is without prejudice to the rights of any person who may petition the Commission for modification or stay of the Chain Broadcasting Regulations.

U. S. GOVERNMENT PRINTING OFFICE: 1942